

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA INC., et al.,

Defendant.

No. C10-1823-JLR

MICROSOFT'S OPPOSITION TO
DEFENDANTS' MOTION TO
EXCLUDE AND STRIKE PORTIONS
OF THE EXPERT REPORT OF DR.
THEO BODEWIG

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Noted: July 31, 2013 at 10:00 AM

ORAL ARGUMENT REQUESTED

MICROSOFT'S OPPOSITION TO DEFENDANTS'
MOTION TO EXCLUDE AND STRIKE
PORTIONS OF THE EXPERT TESTIMONY OF
DR. THEO BODEWIG

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1 **I. INTRODUCTION**

2 At every stage of opposing Microsoft’s anti-suit injunction, Motorola insisted it should
 3 be permitted to enforce its German injunction, and if Microsoft hoped to avoid it, Microsoft
 4 should engage further in the Orange Book procedure. This Court rejected that argument and
 5 was affirmed by the Ninth Circuit in September 2012. Since then, the Court replaced that
 6 preliminary injunction with a broader order barring Motorola from seeking or enforcing any
 7 injunctions against Microsoft on standard-essential patents. The argument that Microsoft
 8 should have been forced to submit itself to the Orange Book in Germany is dead and buried.

9 Having failed to convince four judges that its position had any merit, Motorola seeks to
 10 inject the Orange Book into the upcoming jury trial, serving a report from its German legal
 11 expert, Dr. Maximilian Haedicke. Motorola apparently intends to turn its meritless Orange
 12 Book argument into a “mitigation” defense: Microsoft should not have relocated its primary
 13 distribution facility for Europe, the Middle East, and Africa out of Germany to avoid the
 14 injunction—it should have submitted itself to further Orange Book proceedings. But Haedicke
 15 adds nothing that could resurrect Motorola’s previously-rejected argument. In fact, he
 16 confirms that the Court and the Ninth Circuit were right to reject it, admitting that predicting
 17 the outcome of further Orange Book proceedings would be pure speculation.

18 Haedicke had no idea how high Microsoft’s Orange Book offer would have to be for
 19 Motorola to accept it. Ex. 1, Excerpts of June 14, 2013 Deposition of Maximilian Haedicke
 20 (“Haedicke Dep.”) 61:18–21 (“[Q.] [I]f Microsoft made an Orange Book offer, you don’t
 21 know what . . . offer Motorola would have accepted; correct? A. Pure speculation.”).
 22 Motorola insists Microsoft could have followed an alternative Orange Book procedure,
 23 escrowing funds and allowing Motorola to set the royalty, but Haedicke had no idea what
 24 royalty Motorola would have set (*id.* at 61:22–24), or how much money Microsoft would have
 25 had to escrow to ensure it would not be enjoined (*id.* at 53:25–54:11). Motorola contends

1 Microsoft could have then challenged Motorola’s royalty in a separately-filed proceeding, but
 2 Haedicke had no idea what the outcome of such a proceeding would be (*id.* at 56:21–60:13,
 3 61:25–62:6)—even what evidence that court would consider, what standard it would apply to
 4 set a royalty itself, or how long that process would take (*id.* at 21:24–22:16, 23:25–25:10,
 5 62:7–25).

6 Motorola’s present motion now seeks to partially exclude testimony from Dr. Theo
 7 Bodewig, Microsoft’s expert on German antitrust and patent law, for *agreeing with* Haedicke
 8 that the Orange Book process is imprecise and its outcome uncertain. (*See* Dkt. No. 731,
 9 Defs.’ Mot. to Exclude and Strike Portions of the Expert Testimony of Dr. Theo Bodewig
 10 (“Bodewig Mot.”).) Motorola’s motion targets statements on European antitrust law and the
 11 Orange Book procedure which help explain why the outcome of any Orange Book proceedings
 12 would have been, as Haedicke conceded, “pure speculation.” As Bodewig explains, German
 13 courts are uncertain as to whether the Orange Book process is permissible under European
 14 antitrust law, and the European Commission has taken the initial position that forcing standard-
 15 implementers into Orange Book proceedings under threat of an injunction is anticompetitive.
 16 Motorola’s complaints that these statements are not final decisions, or that their timing would
 17 confuse the jury, are unavailing—any lack of finality only confirms that the Orange Book’s
 18 status is up in the air, and the rising recognition in Europe that the Orange Book is inadequate
 19 (and possibly a violation of antitrust law) only confirms that this Court and the Ninth Circuit
 20 were right to reject Motorola’s arguments in the first place. Bodewig’s testimony is plainly
 21 relevant to *rebutting* the confident claims made by Haedicke in his report that the process is
 22 “very easy,” and would serve to clarify the Orange Book issues for the jury—should the Court
 23 choose to permit any testimony about the Orange Book process at all.

24 Finally, Motorola’s motion also miscasts some of the facts upon which Bodewig relied
 25 as expert opinions, then argues that he should not be permitted to offer them. Bodewig’s

1 reliance on the record in this case and the German case—including the timing of events as
 2 shown by the docket, fact witness testimony, and the Court’s Findings of Fact and Conclusions
 3 of Law—is entirely appropriate. Motorola’s motion provides no basis for excluding any of
 4 Bodewig’s opinions in reliance on those facts.

5 **II. ARGUMENT**

6 **A. Bodewig’s Analyses of European Commission Statements And A Düsseldorf** 7 **Court Decision Are Relevant.**

8 The Orange Book process is so plagued with uncertainty that even Haedicke,
 9 Motorola’s expert on German law, admitted it would be “pure speculation” to guess what may
 10 have occurred had Microsoft followed it. (*See* Dkt. No. 724, Microsoft’s Rule 702 Mot. at 13–
 11 16.) For the reasons set forth in Microsoft’s motion, the Orange Book issue should not be
 12 injected into the trial at all. (*See id.* at 12–16.) But if it is, Microsoft is entitled to rebut,
 13 through its own expert, Haedicke’s claim that it would have been “very easy for Microsoft to
 14 avoid an injunction” through the Orange Book procedure (Dkt. No. 725 Ex. 7, Haedicke Rpt.
 15 ¶ 6), his insistence that the Orange Book provides “a very clear-cut procedure,” Haedicke Dep.
 16 45:12–18, and Motorola’s overall contention that Microsoft should have acquiesced to
 17 Motorola’s demands and followed the Orange Book. The proposed Bodewig testimony that
 18 Motorola seeks to exclude helps establish that, contrary to Motorola’s claims, the Orange Book
 19 is not a settled, predictable procedure, and Motorola’s insistence on forcing standard-
 20 implementers to engage in Orange Book procedures under threat of injunctions may have
 21 violated European antitrust law.

22 First, as Bodewig explained in his report, in March of 2013, the Regional Court
 23 Düsseldorf sought assistance from the European Court of Justice, asking that court whether the
 24 Orange Book process is adequate under European antitrust law, or whether standard-
 25 implementers are entitled to a higher degree of protection from injunctions on standard-
 26 essential patents. (*See* Dkt. No. 732 Ex. F, June 10, 2013 Expert Report of Dr. Theo Bodewig

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1 (“Bodewig Rpt.”) ¶¶ 40, 44–46, 53–55.) Bodewig opines that the Düsseldorf court’s request
 2 demonstrates that even German courts are uncertain as to whether the Orange Book procedure
 3 should be or can be followed, in light of European antitrust law. *Id.* ¶ 44–46; Dkt. No. 732 Ex.
 4 K, March 21 2013 Regional Court Düsseldorf Ruling at MS-MOTO_1823_00005257641–2.
 5 Motorola’s objection to this testimony is that the Düsseldorf court’s request “does not
 6 constitute a final decision and merely indicates that the lower court would like clarification
 7 from the European Court of Justice.” Bodewig Mot. 8. Motorola’s claim that this somehow
 8 renders Bodewig’s conclusions unreliable makes no sense—Bodewig is affirmatively relying
 9 on the fact that the Düsseldorf court is uncertain, and needs clarification from higher courts, to
 10 support his conclusion that the status of the Orange Book procedure in Germany is uncertain.
 11 Motorola’s expert Haedicke argued that the Düsseldorf court had a “clear bias . . . in favor of
 12 the Orange Book proceeding,” but conceded that the Düsseldorf court may well be wrong as a
 13 matter of European antitrust law, and that the European Court of Justice would have the last
 14 word. Haedicke Dep. 96:22–100:1.

15 Second, Bodewig opines that multiple statements made by the European Commission
 16 (pursuant to its ongoing investigations of Samsung’s and Motorola’s pursuit of injunctions
 17 against standard-essential patent holders) further demonstrate that the status of the German
 18 Orange Book procedure is unsettled. Bodewig Rpt. ¶¶ 40–43, 47–55. The European
 19 Commission’s opinion, as reflected in these statements, is that injunctions on standard-
 20 essential patents are not only inappropriate, but seeking them against standard-implementers
 21 who are willing to accept a license on RAND terms is an abuse of European antitrust law. *See*
 22 *id.*; Dkt. No. 732 Ex. J, May 6, 2013 European Commission Press Release re: Statement of
 23 Objections to Motorola Mobility on potential misuse of mobile phone standard-essential
 24 patents at MS-MOTO_1823_00005258267–8. Again, Motorola complains that these are not
 25 final positions taken by the European Commission, Bodewig Mot. 7, but Bodewig never

1 claimed that they were—his proposed testimony clearly identifies the Commission’s view as a
 2 “preliminary opinion” that “suggests” ramifications for the Orange Book procedure in German
 3 courts, and further indicates that the process Motorola insists Microsoft should have followed
 4 is unsettled and uncertain. Bodewig Rpt. ¶¶ 51–52, 54. The Orange Book procedure is
 5 constrained by European antitrust law (as Haedicke conceded), and the European
 6 Commission’s statements—regardless of whether they are final positions—at a minimum call
 7 into question the viability of the Orange Book procedure. The statements go beyond simply
 8 suggesting the Orange Book is unsatisfactory under European antitrust law—the Commission
 9 suggests that by forcing defendants to follow that procedure, patent holders like Motorola and
 10 Samsung may have been violating European antitrust law. *See id.* ¶¶ 50–52; Dkt. No. 732 Ex.
 11 I, May 6, 2013 European Commission Memo at MS-MOT0_1823_00005258274 (“[A]n
 12 interpretation of [the Orange Book] ruling whereby a willing licensee is essentially not entitled
 13 to challenge the validity and essentiality of the SEPs in question is potentially anti-
 14 competitive.”).¹

15 Motorola falls back on claims that Bodewig’s testimony would confuse, mislead, or
 16 prejudice the jury, but it is Motorola that seeks to inject the Orange Book procedure into the
 17 case, with proposed testimony that misleadingly suggests the procedure is “easy,” settled, and
 18 predictable. To the contrary, the procedure is highly unsettled, completely unpredictable (even
 19 by the admission of Motorola’s own expert), and Motorola’s efforts to force multiple standard-
 20 implementers to subject themselves to the Orange Book procedure under threat of injunctions
 21 have drawn the scrutiny of the European Commission’s antitrust authorities. Motorola should
 22 not be heard to invoke Rule 403 to bar Microsoft from introducing its own expert testimony to
 23
 24

25 ¹ Haedicke’s report confirms that the Mannheim court operates under that “potentially anti-competitive”
 26 interpretation, and a defendant is *not* entitled to challenge the validity and essentiality of the patent. (*See* Dkt. No.
 725 Ex. 7, Haedicke Rpt. ¶¶ 39–40.)

1 clear the waters muddled by Motorola. In any event, Motorola's specific complaints under
2 Rule 403 are without merit.

3 Motorola contends that the jury would be confused because the Düsseldorf court and
4 European Commission statements date from December 2012 through May 2013, and "are not
5 relevant to why Microsoft chose not to use the Section 315 Orange Book procedure between
6 July 2011 and July 2012." Bodewig Mot. 8. This relevance standard springs from nowhere:
7 Haedicke offers no testimony on *why* Microsoft did not follow the Orange Book procedure at
8 particular times either—the thrust of his testimony is a claim the procedure existed, and that
9 Microsoft should have followed it. (See Dkt. No. 725 Ex. 7, Haedicke Rpt. ¶ 6.) Bodewig's
10 rebuttal to that claim—which includes the argument that the outcome of any such Orange Book
11 proceeding would have been highly uncertain—is corroborated by these later statements which
12 suggest that the viability of the Orange Book is in serious doubt. Bodewig is not claiming
13 those later statements "influenced [Microsoft's] decision," Bodewig Mot. 8, rather that they
14 show that the procedure was indeed uncertain, and Microsoft's decision not to subject itself to
15 it wise. Further, Haedicke admitted that the Orange Book procedure was in flux from July
16 2011 onward, citing two aspects of a December 9, 2011 judgment in his report (Dkt. No. 725
17 Ex. 7, Haedicke Rpt. ¶¶ 39, 40) that imposed additional constraints on defendants seeking to
18 invoke the Orange Book, and conceding at his deposition that none of the constraints German
19 district courts have introduced following the original Orange Book decision have been
20 favorable to the party seeking a license to standard-essential patents. See Haedicke Dep.
21 46:11–47:12. Motorola should not be permitted to present a truncated, static picture of the
22 Orange Book procedure, when in fact the Orange Book has been evolving over time to add
23 multiple new constraints favorable to the patent holder, to the point where the procedure has
24 been called into question under European antitrust law.

As Microsoft urged in its Rule 702 motion, Haedicke's proposed testimony concerning the Orange Book has no place in this case, especially his baseless argument that Microsoft should have subjected itself to the Orange Book rather than relocate its EMEA distribution facility out of Germany. (*See* Dkt. No. 724, Microsoft's Rule 702 Mot. at 12–16.) If Motorola is permitted to present that testimony, Microsoft must be permitted to demonstrate to the jury not only the uncertainty that surrounds the Orange Book procedure, but its borderline status as a potential violation of European antitrust law.

B. Bodewig Should Be Permitted To Testify In Reliance On Facts In The Record.

Motorola argues that Bodewig should be precluded from offering testimony on three specific subjects: (1) “why Microsoft chose to relocate its distribution facility,” (2) “the potential effects of this Court’s antisuit injunction,” (3) whether Microsoft is a willing licensee under the European Commission’s definition. Motorola’s arguments are premised on a misreading of Bodewig’s expert report and out-of-context statements from his deposition, and should be rejected.

Haedicke’s expert report suggested that the Court’s grant of Microsoft’s motion for a preliminary injunction would have enabled Microsoft to avoid relocating its German facility, because “had Motorola enforced the German judgments, it would have violated” this Court’s order. (Dkt. No. 725 Ex. 7, Haedicke Rpt. ¶ 62.) In response, Bodewig explained in his expert report that Haedicke’s opinion was unfounded, because given the schedule of the German court’s planned decision, and the timing necessary to relocate the facility, there would not have been sufficient time for Microsoft to await a decision before relocating the facility.² *See* Bodewig Rpt. ¶¶ 108–12. As indicated in his report, Bodewig’s conclusion is based on his understanding of this case and the German proceedings, coupled with facts concerning the

² As established at his deposition, Haedicke had not been informed of any of the factual details surrounding the relocation, so had no basis to make any claims about how and when Microsoft could have made that move. *See* Haedicke Dep. 105:25–106:19.

1 relocation that have emerged in discovery. *See id.* ¶¶ 110–11. Bodewig offers no expert
 2 opinion on *why* Microsoft relocated its German facility—he simply relies on testimony
 3 concerning when that decision had to be made to explain why Haedicke’s contentions about
 4 what could have happened in Germany are incorrect. Motorola’s motion identifies no
 5 proposed Bodewig testimony that could possibly merit exclusion.

6 Motorola does not explain what proposed Bodewig testimony concerning “the potential
 7 effects of this Court’s antisuit injunction” it seeks to exclude. *See* Bodewig Mot. 8–9. To the
 8 extent that Motorola intended to refer to Paragraph 112 of Bodewig’s report—concerning the
 9 timing of the relocation, the Court’s anti-suit injunction ruling, and Motorola’s appeal to the
 10 Ninth Circuit—Motorola’s argument should be rejected. Bodewig, again relying on the
 11 underlying facts of this case, and his knowledge of German legal procedures, explains that
 12 contrary to Haedicke’s suggestion, the record shows (1) Microsoft had to move its Germany
 13 facility prior to the preliminary injunction ruling, and (2) Motorola was appealing the Court’s
 14 preliminary injunction. And if that appeal succeeded, Microsoft (and its German facility)
 15 would have been immediately vulnerable again to Motorola’s German injunction. *See*
 16 Bodewig Rpt. ¶ 112. The exchange at Bodewig’s deposition cited by Motorola only
 17 establishes that Paragraph 112 includes facts about the procedures here in and in the Ninth
 18 Circuit upon which Bodewig relied, not that he is offering them as his opinion. *See* Bodewig
 19 Mot. 6. Bodewig’s opinion in Paragraph 112 is that *given those facts*, Haedicke’s claim that
 20 the April 2012 preliminary injunction ended all concerns for Microsoft in Germany is
 21 incorrect.

22 Finally, Motorola claims that Bodewig “admitted that he did not have any expertise that
 23 would allow him to conclude, from looking at Microsoft’s offers, whether it is a willing
 24 licensee.” Bodewig Mot. 8–9. But Motorola does not identify any such admission, nor does it
 25 state what Bodewig testimony it actually seeks to preclude. As Bodewig explained in his

report, this case “is a RAND case,” meaning the opinions of the European Commission are applicable: if a standard-essential patent defendant “is a willing licensee and will accept (F)RAND terms, no injunction is appropriate” under European antitrust law. Bodewig Rpt. ¶ 51. Bodewig explains that in the view of the European Commission, a defendant can still challenge validity, essentiality, or infringement of asserted standard-essential patents and remain a willing licensee. *Id.* Motorola does not identify or challenge those statements in its brief. Microsoft filed this case seeking to enforce Motorola’s obligation to grant RAND licenses, and has made clear to the Court that it is willing to accept a license on RAND terms. (*See, e.g.,* Dkt. No. 95, Microsoft’s Reply in Supp. of Mot. for Partial Summary J. (Sept. 30, 2011) at 9.). The posture of the case alone provides sufficient basis for Bodewig’s statement that Microsoft “is a willing licensee” for purposes of explaining how European antitrust law would apply to the situation between Motorola and Microsoft. *Id.* ¶ 52. And again, Motorola does not identify or challenge that opinion in its brief either.

Instead, Motorola cites to two exchanges from Bodewig’s deposition, where Bodewig explained an additional, independent reason why he believed Microsoft fell within the scope of the European Commission’s statement—that Microsoft’s Orange Book offers showed it was willing to enter into a RAND license for the patents Motorola asserted in Germany. (*See* Dkt. No. 732 Ex. G, Bodewig Dep. 51:5–52:1.) Contrary to Motorola’s characterization, Bodewig did not “admit he did not have any expertise” to conclude that Microsoft’s offers showed it was willing to enter into a RAND license—he only stated that it did not require special expertise in German law to conclude that a party *offering* a license agreement on RAND terms was *willing to enter* a license agreement on RAND terms. (*See id.* 51:18–52:1.) And as Bodewig explains elsewhere in his report, in light of the Court’s Findings of Fact and Conclusions of Law, Microsoft’s Orange Book offer in Germany indeed offered a license agreement on RAND terms—in fact, it offered terms significantly higher than a RAND royalty, yet Motorola still

rejected it, and the German court approved. Bodewig Rpt. ¶¶ 9, 83–92. Bodewig’s statements at his deposition provide no basis for precluding any of his proposed testimony.

III. CONCLUSION

For the foregoing reasons, Motorola’s motion to exclude and strike portions of Bodewig’s testimony should be denied.

DATED this 12th day of July, 2013.

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I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

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21 DATED this 12th day of July, 2013.

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